

MARE CLAUSUM: THE AMERICAN FISHERIES PROMOTION ACT OF 1980

I. INTRODUCTION

The freedom of the high seas beyond the limits of a coastal state's territorial waters has been a recognized right under international law ever since Hugo Grotius, in the early seventeenth century, successfully argued against the Portuguese claim to exclusive use of the South Atlantic and Indian oceans for trade with the Indies.¹ The latter part of the twentieth century, however, has given rise to increasing claims by coastal states for rights of dominion over those waters which, for three and a half centuries, were considered beyond the jurisdiction of any sovereignty.^{1a}

The most recent assertion of such rights by the United States is manifested in the American Fisheries Promotion Act of 1980,² which seeks to promote and expand United States commercial fishing interests by phasing out all foreign fishing within the United States 200-mile fishery conservation zone (hereinafter referred to as FCZ).^{2a} The Fishery Conservation and Management Act of 1976,³

1. As a young Dutchman in 1604, Grotius became embroiled in the long-drawn conflict between the Netherlands and Portugal. For an enlightening discussion of the collapse to national claims of dominion over the various oceans, see G. BUTLER & S. MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 40-60 (1928). For information regarding the life and legal works of Grotius, see generally W. KNIGHT, *THE LIFE AND WORKS OF HUGO GROTIIUS* 1-289 (1925); E. DUMBAULD, *THE LIFE AND LEGAL WRITINGS OF HUGO GROTIIUS* 3-178 (1969).

1a. For a thorough-going review of the emergence of various claims to coastal state jurisdiction over zones contiguous to the territorial sea, see I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 209-11 (3d ed. 1979).

2. American Fisheries Promotion Act of 1980, Pub. L. No. 96-561, tit. II, pt. C, 94 Stat. 3296 (codified in scattered sections of 16 U.S.C.), signed into law on Dec. 22, 1980 [hereinafter cited as FPA].

2a. The fishery conservation zone (FCZ) was established by the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 (1976):

There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured. 16 U.S.C. § 1811 (1976).

3. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (FCMA) (codified in scattered sections of 16 U.S.C.). See Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427 (1976); *Symposium on the Fishery Conservation and Management Act of 1976*, 52 WASH. L. REV. 427 (1976).

which established the 200-mile FCZ, is amended by sections 230-38 of the Fisheries Promotion Act (FPA). This Note will discuss the purposes of these sections, characterize their negative effects upon United States diplomacy and international commerce, and describe how they derogate from the classical freedom of the seas.

II. BACKGROUND AND NEED

The Magnuson Fishery Conservation and Management Act (MFCMA)⁴ established the exclusive fishery management authority of the United States over the following categories: (1) all fish within the FCZ⁵ except tuna;⁶ (2) all U.S.-origin anadromous species⁷ throughout their migratory range (except in the zones of other states);⁸ and (3) all fishery resources of the U.S. continental shelf beyond the FCZ.⁹ In asserting this jurisdiction, the United States sought to provide for the effective conservation and management of fish stocks and to assure their development for "the greatest overall benefit of the nation."¹⁰ The MFCMA was thus designed to provide the economic foundation needed for substantial growth in the U.S. fishing industry.¹¹

American fishermen, however, failed to achieve any significant economic growth or substantial increase in their harvest over that of foreign fishermen after the enactment of the MFCMA.¹² American fishermen in 1979 took only fifty-five percent of the value of fish landed in the FCZ; an increase of about seven percent since the passage of the MFCMA in 1976.¹³ The continued foreign

4. Section 238 of the FPA provides that all references to the Fishery Conservation and Management Act of 1976 shall be redesignated as references to the Magnuson Fishery Conservation and Management Act (MFCMA).

5. 16 U.S.C. § 1812(1) (1976).

6. 16 U.S.C. § 1813 excludes "highly migratory species of fish" from the exclusive fishery management authority of the United States. 16 U.S.C. § 1802(14) defines "highly migratory species" as species of tuna which, in the course of their life cycle, spawn and migrate over great distances in waters of the oceans.

7. "Anadromous species" means species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters. 16 U.S.C. § 1802(1) (1976).

8. 16 U.S.C. § 1812(2) (1976).

9. 16 U.S.C. § 1812(3) (1976).

10. See 16 U.S.C. § 1802(18)(A) (1976).

11. H.R. REP. NO. 1138, 96th Cong., 2d Sess. 16 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3275 (1980) [hereinafter cited as 1980 HOUSE REPORT].

12. *Id.* at 17.

13. *American Fisheries Promotion: Hearings on H.R. 7039 Before the Subcomm. on*

domination in the harvesting of underutilized species¹⁴ and the maintenance of foreign trade barriers blocking the sale of U.S. fish in Japanese and other world markets¹⁵ were factors which contributed to the perceived need for the FPA legislation. Considering these factors along with the potential benefits of stimulating the U.S. fishing industry, Congress reasoned:

Clearly, the establishment by the FCMA of the 200-mile zone has not resulted in the hoped-for rapid expansion of the U.S. fishing industry. Full development of U.S. fishery resources by American fishermen and processors would contribute over \$1 billion per year to the national economy, make the U.S. a net exporter of fish products, and lead to the employment of some 43,000 persons.¹⁶

Hence, Congress enacted the FPA in hopes of enabling the fishing industry to more fully develop U.S. fishery resources.¹⁷

III. PROVISIONS OF THE FPA

A. Phaseout of Foreign Fishing

The most controversial feature of the FPA is its mechanism for phasing out foreign fishing in the U.S. FCZ within a period of five years.¹⁸ Under the MFCMA, specific guidelines were established to regulate the total allowable level of foreign fishing (hereinafter referred to as TALFF) within the U.S. FCZ.¹⁹ Each of the Regional Fishery Management Councils created by the MFCMA²⁰ determined a TALFF based upon "that portion of the optimum yield of such fishery which will not be harvested by vessels of the United States. . . ." ²¹ "Optimum yield" is defined by

Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 2d Sess. 323 (1980) [hereinafter cited as 1980 *Hearings*].

14. *Id.* at 42.

15. *Id.* at 43.

16. 1980 HOUSE REPORT, *supra* note 11, at 45.

17. *Id.*

18. FPA § 230, 94 Stat. 3296, amends § 201(d) of the MFCMA, 16 U.S.C. § 1821(d) (1976).

19. 16 U.S.C. § 1821 (1976).

20. 16 U.S.C. § 1852 establishes eight such regional councils, known as the New England, Mid-Atlantic, South Atlantic, Caribbean, Gulf, Pacific, North Pacific, and Western Pacific Councils.

21. 16 U.S.C. § 1821(d) (1976) subsequently amended by FPA § 230.

the MFCMA²² in terms of what provides "the greatest overall benefit to the nation"²³ coupled with a prescribed level of fishing based on a modification of the maximum sustainable yield²⁴ which takes into account "relevant economic, social or ecological factor[s]."²⁵ If United States fishermen were to have the capacity to harvest the full optimum yield (OY) in any particular fishery for a given year, then foreign fishermen would be excluded from that fishery for that year.²⁶ Thus, a mechanism for phasing out foreign fishing within the FCZ was already contained in the MFCMA in that foreign fishermen would be allowed to harvest only that portion of the OY which American fishermen did not.²⁷ The FPA phaseout mechanism, however, works by percentages to automatically exclude foreign fishing regardless of whether American fishermen harvest a catch equivalent to the OY.²⁸

Under the FPA, the "phaseout reduction factor amount" for any harvesting season after the 1980 harvesting season equals fifteen percent of the base harvest for the fishery if U.S. vessels harvest seventy-five percent or more of the phaseout reduction factor amount determined for the immediately preceding harvesting season.²⁹ If U.S. vessels harvest at least fifty percent but less than seventy-five percent of the phaseout reduction factor amount for the preceding harvesting season, then the phaseout reduction factor amount for the next harvesting season will be an amount equal to ten percent of the base harvest.³⁰ If the U.S. vessels

22. 16 U.S.C. § 1802(18) (1976).

23. 16 U.S.C. § 1802(18)(A) (1976).

24. "Maximum sustainable yield" is a theory developed around the turn of the century which posits that for each stock of fish there exists a level of fishing at which the maximum tonnage of fish can be taken year after year without depleting the stock. Maximum physical yield, however, is now taken into consideration along with maximizing net economic revenue, maximizing aesthetics, and maximizing total recreational benefits, as complementary criteria which have welded to reflect the desirability of achieving an "optimum yield" from fisheries resources. H. KNIGHT, *THE LAW OF THE SEA* 12-13 to 12-19 (1980 ed.).

For a complete discussion of purely economic aspects of national fisheries management, see Anderson, *Criteria for Maximum Economic Yield of an Internationally Exploited Fishery*, in *THE FUTURE OF INTERNATIONAL FISHERIES MANAGEMENT* 159-82 (H. Knight ed. 1975).

See notes 73-88 *infra* and accompanying text.

25. 16 U.S.C. § 1802(18)(B) (1976).

26. See 16 U.S.C. § 1821 (1976).

27. *Id.*

28. See note 18 *supra*.

29. 16 U.S.C. § 1821(d)(1)(D)(i) (Supp. V 1981).

30. 16 U.S.C. § 1821(d)(1)(D)(ii) (Supp. V 1981).

harvest at least twenty-five percent but less than fifty percent of the phaseout reduction factor amount for the preceding harvesting season, then the phaseout reduction factor amount for the next harvesting season will be an amount equal to five percent of the base harvest for that fishery.³¹ The term "annual fishing level" for any fishery after the 1980 harvesting season is the base harvest for the fishery involved, reduced by an amount equal to the total of the phaseout reduction amounts for that harvesting season and for the preceding harvesting seasons.³²

The total allowable level of foreign fishing (TALFF), if any, for each fishery for any harvesting season after 1980 will be the lesser of (1) the phaseout fishing level, or (2) the TALFF as determined by the appropriate fishery management council.³³ As under the MFCMA, the Regional Fishery Management Councils determine the optimum yield for each fishery and the domestic harvest which will occur in that fishery.³⁴ Each fishery management council determines the TALFF as the difference, if any, between the domestic harvest and the optimum yield.³⁵ If the former mechanism is utilized, it is possible for foreign fishing to be phased out completely for a particular fishery despite the fact that a surplus of fish would exist.³⁶

As an example,³⁷ suppose the optimum yield of a fishery is 100,000 tons and the U.S. capacity is 60,000 tons. Foreign fleets would be authorized to take up to 40,000 tons under the old MFCMA provision, yet under the FPA, the 1981 allowable foreign catch is automatically reduced by fifteen percent of 34,000 tons, even if U.S. fishermen could not harvest any of the 6,000 tons denied the foreign fishermen. In subsequent years, the allocation to foreign fishermen is to be further reduced by fixed percentages until no foreign fishing is allowed. Under the phaseout mechanism, U.S. fishermen do not have to be capable of harvesting all of the amount denied the foreign fishermen before further reductions in

31. 16 U.S.C. § 1821(d)(1)(D)(iii) (Supp. V 1981).

32. 16 U.S.C. § 1821(d)(1)(E) (Supp. V 1981).

33. MFCMA § 201(d)(2), 16 U.S.C. § 1821(d)(1)(E)(2)-(3) (1976).

34. 16 U.S.C. § 1853(a)(4) (1976).

35. 16 U.S.C. § 1821(d) (1976).

36. See 1980 HOUSE REPORT, *supra* note 11, at 70-71 (dissenting views of Rep. Paul N. McCloskey, Jr.).

37. This is the example of Rep. Paul McCloskey, Jr. in his dissenting views of the FPA. *Id.*

the foreign catch are mandated. If U.S. fishermen can, in the future, harvest at least fifty percent of the amount denied foreign fishermen in the previous year, all foreign fishing in the FCZ will be prohibited by 1990. This would result in leaving substantial resources underutilized in whatever amount between 50 and 100 percent of the previous year's TALFF that goes uncaught by U.S. fishermen.³⁸

B. Linking TALFF Allocations to Removal of Trade Barriers

While Congress expected the U.S. fishing industry to expand rapidly due to a relatively predictable reduction in the level of foreign fishing, it recognized that there would be little incentive for such expansion to occur without a substantial increase in the market for U.S. fish produce.³⁹ Thus, the FPA requires the Secretaries of State and Commerce to consider, inter alia, whether and to what extent a foreign state imposes tariff or nontariff barriers on the importation, or otherwise restricts the market access of United States fish or fishery products when they allocate any rights to fish within the U.S. FCZ to that foreign state.⁴⁰ Consequently, those states desiring access to U.S. fisheries are prompted to lower their trade barriers and encourage the purchase of U.S. fish, while those nations maintaining trade barriers may have their fishing allocations cut or terminated.

Although the "carrot principle" of using allocations to improve and expand trade seems sensible at first glance, the phaseout of foreign fishing will seriously jeopardize the United States ability to use this approach in the long run. Extending the "carrot principle" logic to the likely effect of cuts in foreign allocations resulting from the phaseout mechanism, it becomes evident that American fish export access to those foreign states hurt by the phaseout will be restricted. Thus, the linking of TALFF allocations with the removal of foreign trade barriers will have the reverse effect of that which was intended as the TALFF is phased out.⁴¹

38. *Id.*

39. See 1980 HOUSE REPORT, *supra* note 11, at 23; 1980 *Hearings*, *supra* note 13, at 82.

40. FPA § 231, 94 Stat. 3297, amending MFCMA § 201(e)(1), 16 U.S.C. § 1821(e)(1) (1976 & Supp. V 1981).

41. See 1980 *Hearings*, *supra* note 13, at 82 (statement of Thomas Pickering, Dept. of State).

C. *Foreign Fishing Fee Increases*

The FPA increases the permit fees for allowing foreign vessels to fish within the FCZ.⁴² In determining the permit fees, the Secretary of Commerce charges foreign fishermen an amount proportional to their share of the volume of the total harvest in the FCZ and United States territorial waters.⁴³ This is considered equitable since administration, research and enforcement bear a reasonable relation to the volume of fish harvested.⁴⁴ Moreover, such fee and cost increases are justified by the consideration that American taxpayers should not be required to subsidize foreign fishing.⁴⁵ The foreign fishing fees should not be regarded as a practical long-term source of funding, however, because the income they provide will eventually diminish as foreign fishing is phased out.⁴⁶

D. *Full Observer Coverage Program*

The primary objective of the MFCMA is the conservation and management of fishery resources.⁴⁷ Toward this end, it is important to recognize that enforcement is central to the entire fisheries regulation process.⁴⁸ Prior to enactment of the FPA, the overall observer program covered 17.1 percent of foreign fishing activity in the Alaskan region, 22.1 percent in the South Atlantic

42. FPA § 232, 94 Stat. 3298, amends MFCMA § 204(b), 16 U.S.C. § 1824(b)(10) (1976 & Supp. V 1981).

43. If the criterion excluded the harvest in territorial waters, the foreign share of the catch and hence the foreign fees would be substantially higher. The foreign catch in 1979 was 67 percent of the total harvest in the FCZ, but only 39 percent of the total catch in the FCZ and the territorial sea combined (foreign fishing is not allowed to any extent within the territorial sea, which extends three nautical miles from the coastal baseline). According to the new formula, foreign fishermen would have had to pay approximately \$63 million in 1979, instead of \$18.5 million they actually paid under the old MFCMA formula. 1980 HOUSE REPORT, *supra* note 11, at 36.

44. *See id.*

45. *Id.*

46. 1980 *Hearings*, *supra* note 11, at 52 (statement of Richard Frank, Dept. of Comm.).

47. 16 U.S.C. §§ 1801(b) & 1851(a)(2) (1976).

48. For an exhaustive analysis of the role of enforcement, see Goldberg, *Ends and Means: The Role of Enforcement Analysis in International Fisheries Regulation*, in *THE FUTURE OF INTERNATIONAL FISHERIES MANAGEMENT* 183-211 (H. Knight ed. 1975). Goldberg presents the following "table of values" to illustrate the interplay of several elements directly relevant to enforcement:

and 23.2 percent in the Mid-Atlantic and New England regions.⁴⁹ There were 382 reported violations of the MFCMA in 1979, most of these involving "the attempted concealment of total catches by erroneous entries into ships' logs."⁵⁰

In order to reduce incidental catches of prohibited species and ensure the accurate reporting of all foreign catches, the FPA requires that a United States observer be stationed aboard each and every foreign fishing vessel within the FCZ and requires the foreign vessel to pay an additional surcharge to cover the costs of providing the observer.⁵¹ The blanket coverage of this provision may be waived, however, in situations where a fleet of harvesting

TABLE OF VALUES

WHO ENFORCES ¹	GOALS IN ENFORCEMENT ²	THE ENFORCEMENT PROCESS ³	DIRECT INFLUENCES ³	INDIRECT INFLUENCES ³	TYPES OF ACTION ²	RESULTS ⁴
Fishery Presence, Enforcement ability	Exclusion of other nations	Need for regulation perceived	Will to enforce	Market Control	Unilateral Species Area	Total exclusion deliberate
Fishery Presence, No enforce- ment ability	Presentation of stock	Regulation promulgated	Cost Monitoring* Arrest*** Post Trial*	Research* Other types of Monitoring*	Bilateral Species Area	Occasional or selective enforcement
No fishery presence, enforcement ability	Maximizing share	Limits tested	Personnel	Technology*	Multi-lateral Species Area	Modest enforcement
No fishery presence, no enforcement ability	Achieving	Limits monitored*	Equipment*	Foreign and/or domestic policy		Appearance of enforcement
	Protection of unfished fishery	Reporting*	Ability to withstand	Status of fishery		No enforce- ment
		Apprehension***	collateral attack	Effect of national enforcement		
	Other factors	Trial*		Other L.O.S. Issues		
		Post trial*				

1. Scaled as to enforcement potential

2. Scaled as to cost

3. Cost noted by*

4. Degree of cost noted by number of *

Id. at 211. It should be noted that under the FPA, the economic costs of enforcement are borne by foreign fishermen. See FPA § 232, 16 U.S.C. § 1824(b)(10) (Supp. V 1981) on Permit Fees and FPA § 236, 16 U.S.C. § 1821 (Supp. V 1981) on the Full Observer Coverage Program.

49. 1980 HOUSE REPORT, *supra* note 11, at 33-34.

50. *Id.* Japan was the leading violator with a total of 147 incidents. Italy was second with 87. *Id.*

51. FPA § 236, 94 Stat. 3299, amends MFCMA § 201, 16 U.S.C. § 1824(b)(10) (1976 & Supp. V 1981). See 1980 *Hearings*, *supra* note 13, at 43 (statement of Rep. James Weaver, Oregon congressman).

vessels transfers its catch to a mother ship that has an observer aboard,⁵² or where the time during which the vessel engages in fishing is of such short duration that the placing of an observer aboard the vessel would be impractical,⁵³ as in the case of foreign longline tuna vessels.

IV. INTERNATIONAL LAW AND THE FREEDOM OF FISHING

A. 200-mile FCZ as Customary International Law

The MFCMA has been widely criticized as contravening the obligations of the United States under the 1958 Convention on the High Seas⁵⁴ and the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.⁵⁵ Article 2 of the High Seas Convention⁵⁶ provides, *inter alia*, that all nations be allowed the "freedom of fishing" and further provides that "no State may validly purport to subject any part . . . [of the high seas] . . . to its sovereignty."⁵⁷ As has been noted, however, "the acceptance of the inevitability of a 200-nautical mile exclusive economic zone as the wave of the future was so general that this unilateral action created hardly a ripple, despite the fact that it was in clear violation of our obligations under the 1958 Convention on the High Seas."⁵⁸

On May 8, 1970, nine Latin American states signed the Montevideo Declaration on the Law of the Sea.⁵⁹ Those states adhering to the Montevideo Declaration asserted dominion over

52. FPA § 236(i)(2)(A), 94 Stat. 3299 (Supp. V 1981).

53. FPA § 236(i)(2)(B), 94 Stat. 3299 (Supp. V 1981).

54. *Done* at Geneva, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, arts. 2, 6, 22 [hereinafter referred to as the High Seas Convention].

55. *Done* at Geneva, April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285, arts. 1, 7, 9-12 [hereinafter referred to as the Fisheries Convention]. See, e.g., Moore, *Foreign Policy and Fidelity to Law: The Anatomy of a Treaty Violation*, 70 A.J.I.L. 802 (1976).

Unilateral conservation measures were allowed by the Fisheries Convention only when there was "a need for [their] urgent application," and furthermore, they could not "discriminate in form or in fact against foreign fishermen." Fisheries Convention, art. 7, para. 2.

56. See note 54 *supra*.

57. *Id.*

58. Finlay, *The Proposed New Convention on the Law of the Sea—A Candid Appraisal*, 7 SYR. J. INT'L L. & COM. 135, 139 (1979-80).

59. I. BROWNIE, *PUBLIC INTERNATIONAL LAW* 218 (3rd ed. 1979). The text of the Declaration is at 9 I.L.M. 1081-83 (1970), and also 64 A.J.I.L. 1021-23 (1970).

the seas to an extent of 200 nautical miles from their respective coastlines, involving "sovereignty and jurisdiction to the extent necessary to conserve, develop and exploit the natural resources of the maritime area adjacent to their coasts, its soil and its sub-soil," but without prejudice to freedom of navigation and overflight.⁶⁰ By 1978, some seventy-four states had fishing zones of 200 miles, while ten states had claims greater than 12 but less than 200 miles.⁶¹

Senator Warren Magnuson, the principal draftsman of the Fisheries Conservation and Management Act of 1976⁶² (MFCMA),⁶³ has stated that the United States 200-mile claim "played a key role in establishing [the 200-mile FCZ as] a customary rule of international law in a relatively short period of time."⁶⁴ Professor Brownlie had noted in 1979 that "[c]learly the fishery conservation zone, not greater than 200 miles from the usual baselines, is in the process of crystallizing as a principle of customary international law."⁶⁵ Thus, with the widespread acceptance of the 200-mile FCZ in state practice and the lack of any modern multilateral Law of the Sea treaty to the contrary,^{65a} 200-mile coastal state dominion over the sea's resources may correctly be regarded as customary international law.⁶⁶

B. *Freedom of Fishing and Development of the Theory of Optimum Utilization*

The fishery resources of the world's oceans have always been a vital source of food. The "freedom of fishing" principle, which

60. BROWNIE, *supra* note 59.

61. *Id.* at 219.

62. *Supra* note 3.

63. *Supra* note 4.

64. Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427, 431 (1977).

65. BROWNIE, *supra* note 59, at 219.

65a. On Dec. 10, 1982, after the completion of this Note, the Third United Nations Conference on the Law of Sea Treaty was signed by 119 nations, excluding the United States. Article 57 of this Treaty recognizes the right of a coastal state to a 200-mile economic zone. Third United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261.

66. See Fleischer, *The Right to a 200-Mile Exclusive Economic Zone or a Special Fishery Zone*, 14 SAN DIEGO L. REV. 548 (1977). Fleischer correctly notes that in the absence of applicable international conventions, i.e., treaties (see I.C.J. Stat. art. 38), the most important source of international law is custom. *Id.* at 570.

A state claiming that a particular practice constitutes customary international law has the burden of showing that such practice "is in accordance with a constant and uniform usage practiced by the States in question." *Asylum Case* (Colombia v. Peru) 1956 I.C.J. 266.

guaranteed open or unconstrained, nonpriced access to the ocean's living resources, is based primarily on the premise that these resources are inexhaustible.⁶⁷ This observation was central to Hugo Grotius' writings on the freedom of fishing: "For by using, the sea itself is not at all impaired [sic], and it needs no cultivation to bear fruit. Therefore, the sea deservedly remained common."⁶⁸

For three centuries following the writings of Grotius, open access to fisheries remained the prevalent attitude.⁶⁹ The realization that the sea's fishery resources are finite and exploitable beyond the point of self-renewal, however, came to pass only within the last century.⁷⁰ Around the turn of the century, the recognition that fishery resources were rapidly depleting gave rise to varied theories of fisheries management.⁷¹ The outcome of both empirical and theoretical reasoning evolved into the generalization that for each stock of fish there exists a maximum sustainable yield (MSY) and an associated level of fishing which will achieve that yield year after year without depleting the stock.⁷²

1. MAXIMUM SUSTAINABLE YIELD (MSY)

Fisheries biologists have determined that the growth pattern

For a more complete discussion of what constitutes "customary international law" and a state's obligation toward it, see generally BROWNIE, *supra* note 59, at 4-15; G. VON GLAHN, *LAW AMONG NATIONS* 20-24 (4th ed. 1981).

67. See Prewo, *Ocean Fishing: Economic Efficiency and the Law of the Sea*, 15 TEX. INT'L L.J. 261 (1980).

68. H. GROTIUS, *DEFENSE OF CHAPTER V OF THE MARE LIBERUM*, reprinted in Wright, *Some Less Known Works of Hugo Grotius*, in 7 BIBLIOTHECA VISSERIANA 155-56 (1928) cited in Prewo, *id.*

69. Prewo, *supra* note 67, at 262. Prewo remarks that open access was practical not because ocean resources were free goods lacking any degree of scarcity, but because the benefits to be gained from limiting access and extending jurisdiction over the oceans did not justify the costs of establishing and enforcing an exclusive access system. "The situation," he notes, "has undergone radical change." *Id.*

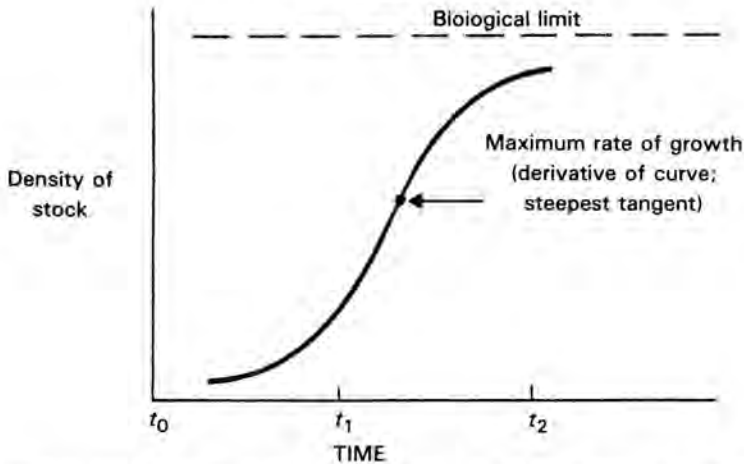
70. See D. JOHNSON, *THE INTERNATIONAL LAW OF FISHERIES* 3 (1965).

A British Select Committee first fully acknowledged the depletion of fishery resources in 1893. The committee blamed declining catches on the destruction of immature fish and urged action to prohibit selling fish below specific sizes. Although the committee's recommendations went unheeded by Parliament, the committee's position yet illustrates the general attitude at the turn of the century: not only were oceanic fisheries exhaustible, but they were rapidly being exhausted. Nielsen, *The Evolution of Fisheries Management Philosophy*, [Dec., 1976] MARINE FISHERIES REV. 15-22, reprinted in H. KNIGHT, *THE LAW OF THE SEA* 12-10 (1980 ed.) [hereinafter cited as Nielsen].

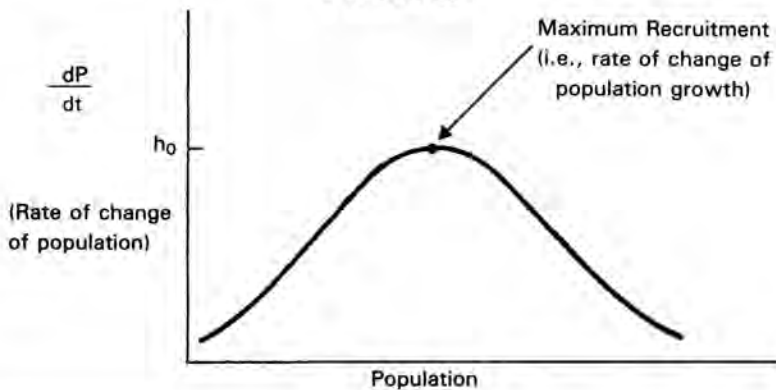
71. See Nielsen, *supra* note 70, at 12-10 to 12-19. The finite nature of fisheries resources is yet of major concern today, as illustrated by the U.N. Draft Convention on the Law of the Sea. See *infra* note 96 and accompanying text.

72. *Id.* at 12-12.

indicated in Figure I is typical of an emerging fish stock.⁷³ From t_0 to t_1 , the population increases slowly since there are few fish available for reproduction,

FIGURE I⁷⁴

but from t_1 to t_2 , there is a period of rapid growth occasioned by the presence of more fish to breed and a lack of pressure on food supplies for the fish stock. After t_2 , the growth rate slows because of pressure on food supplies. Plotting the rate of change of density (dP/dt) against the population (P) yields a curve like that illustrated in Figure II.⁷⁵

FIGURE II⁷⁶

73. H. KNIGHT, *THE LAW OF THE SEA* 660 (1975-76 ed.).

74. *Id.*

75. *Id.* at 661.

76. *Id.*

Of all the benefits arising from use of the MSY concept,⁷⁷ perhaps maximizing the food resource is the most laudable. "Either underutilizing or overutilizing a stock of fish wastes food which is essential for human welfare."⁷⁸ Thus, the Fisheries Convention, recognizing that "[c]onservation programmes should be formulated with a view to securing in the first place a supply of food for human consumption,"⁷⁹ adopted MSY as the appropriate objective of international fisheries management.⁸⁰

The MSY concept has been widely-criticized, however, because it relies solely on biological criteria and fails to take into account the economic, social and political factors also associated with fishery management.⁸¹ From an economic point of view, MSY is considered an inappropriate criterion since it ignores factors such as fishing and user cost.⁸² Economists argue that the intended goal of the fishing industry is not to maximize the gross product (the MSY), but to maximize the net economic revenue (the profit).⁸³ The MSY concept is further criticized for not being able to account for such important nonbiological factors as sport fishing.⁸⁴ Even from the biological point of view, the single species ("fish stock") concept of MSY fails when the ecological interdependence among various fish populations within an ecosystem is considered.⁸⁵ Such interdependence is important to take into account since the majority of fishing techniques in use today catches more than one

77. For example, MSY is an objective criterion which avoids "the myriad problems of contemporary fishery management, now labeled 'social, economic, and political.'" Nielsen, *supra* note 70, at 12-12 to 12-13.

78. *Id.* at 12-13.

79. Fisheries Convention, *supra* note 55, art. 2.

80. Although the wording of the Convention states "optimum," the intent is maximum. Nielsen, *supra* note 70, at 12-13.

81. H. KNIGHT, *MANAGING THE SEAS RESOURCES* 6 (1977).

82. Peterson & Fisher, *The Exploitation of Extractive Resources: A Survey*, 87 ECON. J. 681, 688 (1977). Various studies of individual fisheries have demonstrated the extent of possible economic waste. In the Pacific salmon fishery (which uses the MSY), for example, it was estimated that the same annual yield and total revenue could be obtained with a fifty million dollar reduction in labor and capital investment. J. CRUTCHFIELD & G. PONTECORVO, *THE PACIFIC SALMON FISHERIES: A STUDY OF IRRATIONAL CONSERVATION* 174 (1969).

83. Nielsen, *supra* note 70, at 12-14.

84. *Id.* at 12-13. Nielsen notes that "[t]he importance of sport fishing for psychological well-being has been likened to that of the finer arts. . . . Sport fishing is regarded . . . as a more desirable allocation of resources than commercial fishing because the recreational benefit extends to more people." *Id.* at 12-13 to 12-14.

85. *Id.* at 12-15.

species of fish at a time.⁸⁶ In addition, the influence of politics in fisheries management, even though excluded from determining the MSY, has always existed.⁸⁷ Demands of domestic fishing interests for preferential treatment over foreign fleets are perhaps foremost among political considerations, and certainly seem to have provided the necessary impetus for passage of the FPA in late 1980.⁸⁸

2. OPTIMUM YIELD (OY)

The existence of the aforementioned criteria eventually gave rise to a theory which posited that the only realistic objective of a conservation program was to achieve "a state of optimum fishing."⁸⁹ Despite the status of MSY in international law, binding upon those parties to the Fisheries Convention,⁹⁰ the International Court of Justice has recognized the optimum yield (OY) concept insofar as allowing domestic coastal fishermen preferential rights in exploitation of fisheries. In the Fisheries Jurisdiction Case (*United Kingdom v. Iceland*),⁹¹ the International Court held that the concept of preferential rights had crystallized as customary international law.⁹²

The Third United Nations Conference on the Law of the Sea⁹³

86. Thus, incidental catches of species by fisheries aimed at other species may substantially alter the intended total catch. *Id.*

87. Nielsen, *supra* note 70, at 12-16 provides some examples where biologically-based recommendations have succumbed to contemporary political problems.

88. See 1980 HOUSE REPORT, *supra* note 11, at 68 (dissenting views of Rep. Paul N. McCloskey, Jr.). McCloskey remarks that the FPA "is essentially a collection of goodies for the U.S. commercial fishing industry, artfully drafted to appeal to fishing interests in enough coastal states to assure passage by a committee which primarily consists of representatives of those states." *Id.*

89. H. KNIGHT, MANAGING THE SEAS RESOURCES 8 (1977). For a complete discussion of the development of fisheries management theories, see Nielsen, *supra* note 70.

90. A state's obligation under such treaties is *pacta sunt servanda*, meaning simply that a state must carry out its treaty obligations in good faith. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, U.N. Doc. A/CONF. 39/27, reprinted in 63 A.J.I.L. 875-84 (1969); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 138 (1965).

91. 1974 I.C.J. 3.

92. More specifically, the Court recognized "preferential rights of fishing in adjacent waters in favour of the coastal state in a situation of special dependence on its coastal fisheries, this preference operating in regard to other states concerned in the exploitation of the same fisheries." 1974 I.C.J. at 23, 24-31(emphasis added).

93. Third United Nations Conference on the Law of the Sea, Draft Convention (Informal Text), U.N. Doc. A/CONF. 62/WP. 10/Rev. 3 of Aug. 27, 1980, reprinted in 18 I.L.M. 1129 (1980) [hereinafter cited as U.N. Draft Convention]. See note 65a *supra*.

(UNCLOS III) also adheres to the OY concept, conditioning access to a coastal state's FCZ⁹⁴ upon the economic and other interests of the coastal state.⁹⁵ Article 61 of the U.N. Draft Convention provides that "the coastal State shall establish conservation and management measures to prevent overfishing and to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, *as qualified by relevant environmental and economic factors . . .*"⁹⁶ The Draft Convention, however, provides that economic factors include "the economic needs of coastal fishing communities and the special requirements of developing States."⁹⁷

Article 62, paragraph 1, of the U.N. Draft Convention states that "[t]he coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to Article 61. . . ."⁹⁸ Stressing the economic determinations of the coastal state as a controlling factor, article 62, paragraph 3 is also relevant:

In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, . . . the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone . . .⁹⁹

The MFCMA also recognizes attainment of the OY as a primary objective in its fishery management program.¹⁰⁰ Optimum yield, as used in the MFCMA, is vaguely defined in terms of what provides "the greatest overall benefit to the nation"¹⁰¹ along with a prescribed level of fishing based on a modification of the MSY which takes into account "relevant economic, social or ecological

94. For the purposes of fisheries, the 200-mile exclusive economic zone of the Third United Nations Conference on the Law of the Sea (UNCLOS III) is the functional equivalent of the 200-mile FCZ.

95. Articles 61 and 62 of the Draft Convention, *supra* note 93, deal with the conservation and utilization of the living resources of the 200-mile zone.

96. *Id.* art. 61, para. 3 (emphasis added).

97. *Id.*

98. *Id.* art. 62, para. 1.

99. *Id.* art. 62, para. 3 (emphasis added).

100. See 16 U.S.C. § 1801(b)(4) (1976).

101. 16 U.S.C. § 1802(18)(A) (1976).

factor[s]."¹⁰² Under the MFCMA, the total allowable level of foreign fishing (TALFF) is then allocated on the basis of granting American fishermen preferential interest by allowing foreign fishermen to take only that portion of the OY left unharvested by U.S. fleets.¹⁰³ As previously noted,¹⁰⁴ the FPA further modifies the TALFF determination by employment of the phaseout mechanism.¹⁰⁵ Hence, under the FPA, the OY of a particular fishery may be left unharvested even though foreign fishermen are precluded from that fishery.¹⁰⁶

The FPA House Report concludes from the provisions of the U.N. Draft Convention¹⁰⁷ that "optimum utilization," as sanctioned by international state practice, is conditioned on the economic interests of the coastal state and, therefore, is an *objective* and *not an obligation*.¹⁰⁸

Thus, under the [U.N. Draft Convention], there is no absolute right of foreign States to the surplus of fish in the 200-mile zones. There is merely a conditional privilege. The duty of the coastal State . . . is "to promote the objective" of optimum utilization, but clearly, this duty is qualified. As the plain meaning of the text establishes, optimum utilization in no way prejudices the economic and other interests of the nation.¹⁰⁹

Citing the \$2.7 billion U.S. balance of trade deficit in fisheries products in 1979 and other economic hardships being faced by the U.S. fishing industry, the FPA House Report states that "[t]hese are extremely important economic realities that, by themselves, far outweigh whatever might arguably be lost to foreign fishermen as U.S. fishermen grew into the surplus."¹¹⁰ Thus, it is appropriately argued that the FPA phaseout mechanism is consistent with international law as worded in the U.N. Draft Convention in that economic interests are an appropriate consideration in allocating foreign access to the FCZ.¹¹¹

102. 16 U.S.C. § 1802(18)(B) (1976).

103. 16 U.S.C. § 1821(d) (1976).

104. See notes 27-28 *supra* and accompanying text.

105. See note 18 *supra*.

106. See notes 28, 36 *supra*.

107. See notes 94-99 *supra* and accompanying text.

108. 1980 HOUSE REPORT, *supra* note 11, at 24.

109. *Id.* at 26.

110. *Id.*

111. Although the U.N. Draft Convention does not achieve the status of international law until it is ratified by at least 60 nations, the overwhelming support for the optimum

C. Sanctioned Economic Discrimination and Protectionism

The foreign fishing phaseout mechanism,¹¹² the increase in foreign fishing permit fees,¹¹³ and the observer coverage surcharges¹¹⁴ of the FPA all serve to place substantial restrictions on foreign access to renewable fishery resources within the U.S. FCZ, regardless of the harvesting capabilities of the U.S. fishing industry.¹¹⁵ While other coastal states also adhere to the OY concept of fisheries management, they generally also recognize an obligation to make available to fishermen of other countries that portion of the total allowable catch which exceeds their own national harvesting capabilities.¹¹⁶ The American Fisheries Promotion Act of 1980, however, by implementing higher economic rents¹¹⁷ and the phaseout mechanism, goes beyond the MFCMA and the unilateral actions of other nations in derogating from the classical freedom of the seas.

While the U.N. Draft Convention does not sanction a mandatory phaseout of foreign fishing within a coastal state's FCZ, it does sanction protective and discriminatory practices in fisheries management. The nationalistic fishery conservation guidelines endorsed by the U.N. Draft Convention and the MFCMA along with the FPA are vague and conflicting, containing references to biological, ecological, and economic factors.¹¹⁸ Although the use of the MSY concept is approved, "[n]onadherence to the concept can be justified by relevant environmental and economic factors. The intermingling of these vague and potentially conflicting criteria . . . justifies politically motivated fishery management, while paying lip service to scientific conservation criteria."¹¹⁹ Thus, the broad discretion which is accorded the United States by the provisions of the FPA, and endorsed by the U.N. Draft Convention, serves to

yield provisions indicates that they may be regarded as customary international law as evidenced by widespread acceptance and use in state practice. See note 66 *supra*.

112. See note 18 *supra*.

113. See notes 42-43 *supra*.

114. See note 51 *supra*.

115. See notes 28, 36 *supra*.

116. See Moore, *National Legislation for the Management of Fisheries Under Extended Coastal State Jurisdiction*, 11 J. MAR. L. & COM. 157-63 (1980).

117. I.e., increased permit fees and observer coverage surcharges, *supra* notes 42-43, 51.

118. See notes 95-99, 101-02, 108 *supra*.

119. Prewé, *supra* note 67, at 278.

sanction protective and discriminatory practices.¹²⁰ The FPA goes beyond the "discretionary" protectionism of the U.N. Draft Convention, however, in that the phaseout of foreign fishing is mandatory.¹²¹ Thus, under the FPA, the MSY criterion not only can be, but is subordinated to national economic interests.

V. INTERNATIONAL EFFECTS

A. States with Historic Rights

Among the states affected by the FPA's protectionist phaseout of foreign fishing are those which have traditionally fished in American coastal waters.^{121a} The FPA phaseout fails to consider "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks."¹²² Japan is the most prominent example of a nation that will suffer serious adverse effects from the implementation of the FPA.¹²³ The Japanese have both "habitually fished" in the U.S. FCZ¹²⁴ and "have made substantial efforts in research and identification of stocks."¹²⁵ The Japanese have been operating within a decreased sphere of ocean space ever since the promulgation and acceptance of the 200-mile fishery zone in international law,¹²⁶ and the phaseout of foreign fishing within the FCZ will drastically affect

120. Prewo remarks that, under the U.N. Draft Convention, [s]ince the determination of both variables (total allowable catch and capacity) is at the discretion of the coastal state, it is possible not only to discriminate against foreign fishermen, but to exclude them entirely simply by defining domestic capacity at or above total allowable catch. . . . Discrimination among foreign fishermen on the basis of nationality is explicitly approved.

Id. at 278-79. The FPA, by adding the phaseout mechanism as a factor other than total allowable catch (or OY), is simply making the discrimination mandatory.

121. See notes 29-36 *supra* and accompanying text.

121a. For a discussion of those situations in which foreign fishermen have "acquired rights" in an overseas fishery, see Goldie, *The Oceans' Resources and International Law—Possible Developments In Regional Fisheries Management*, 8 COLUM. J. TRANSNAT'L L. 25-28 (1969).

122. U.N. Draft Convention, *supra* note 93, art. 63, para. 2. The MFCMA also provides that special consideration must be granted such states. 16 U.S.C. § 1821(e)(1) (1976).

123. For an excellent and thorough discussion of the Japanese fishing industry and its interests in American fisheries, see Jones, *Freedom of Fishing in Decline: The Fishery Conservation and Management Act of 1976 and Implications for Japan*, 11 CALIF. W. INT'L L.J. 52 (1981).

124. Conflicts over fishery relations between the United States and Japan began in 1936. *Id.* at 93, n. 201.

125. See *id.*

126. *Id.* at 101.

the Japanese fishing industry.¹²⁷ The displacement of the Japanese fishing industry is contrary to provisions of both the MFCMA¹²⁸ and the U.N. Draft Convention,¹²⁹ and undoubtedly has negative consequences with regard to U.S.-Japanese foreign relations.¹³⁰

Generally speaking, the FPA contravenes widely-accepted goals of international trade. The coercive measure of linking foreign access to the FCZ to each foreign state's removal of trade barriers on U.S. fish produce may effect a reciprocal increase of trade barriers as it excludes more and more nations from the FCZ under the phaseout mechanism.¹³¹ The exclusion and economic displacement of foreign nations from access to U.S. fisheries, and the disregard of the needs of developing nations, along with the general protectionist policy of the FPA, all serve to contravene the two basic goals for world commerce established at the most recent round of international trade negotiations:¹³² first, to expand and liberalize world trade and, second, to improve the trading strength of the developing countries.¹³³ The FPA thus contravenes principles of international law and commerce in attempting to promote the development of the U.S. fishing industry through unilateral action.

B. *Developing States*

Developing states are also adversely affected by the protectionism of the FPA, as it fails to accord them any special consideration in allowing foreign access to the FCZ.¹³⁴ Moreover, subordination of the MSY principle of fisheries management to United States national economic considerations¹³⁵ results in "a clear waste of [fishery] resource[s] and . . . is particularly egregious in light of world requirements for protein. In 1979,

127. See generally *id.*

128. 16 U.S.C. §§ 1821(e)(1)-(2) (1976).

129. U.N. Draft Convention, *supra* note 93, art. 63.

130. See 1980 *Hearings*, *supra* note 13, at 310-13.

131. See note 39 *supra* and accompanying text.

132. The Tokyo Round of General Agreement on Tariffs and Trade (GATT) negotiations.

133. Declaration of Ministers Approved at Tokyo on Sept. 14, 1973, para. 1, *reprinted in* General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents (20th Supp.) 19 (1974).

134. Art. 63, para. 2 of the U.N. Draft Convention, *supra* note 93, provides that developing states in the subregion or region of the coastal state are to be accorded special consideration in being granted access to the coastal state's FCZ.

135. See notes 119-20 *supra* and accompanying text.

800,000 tons of fish were available but not harvested in the U.S. zone. This is enough protein to feed four million people for an entire year."¹³⁶ The disregard of developing states' needs for both expanded coastal fisheries¹³⁷ and food resources thus only serves to occasion further international criticism of U.S. policy toward the Third World.¹³⁸

C. Trade Relations and Commerce

The reactions of foreign governments to the enactment of the FPA have been negative. Mexico repudiated all bilateral fishing agreements with the United States only one week after the FPA was signed.¹³⁹ Japan immediately withdrew proposals for joint ventures with the United States upon hearing of the impending passage of the FPA.¹⁴⁰

These reactions well-illustrate the adverse impact the FPA has on U.S. trade relations. While Mexico has stated that it would be willing to negotiate a new fishing agreement that would be "fair and equitable" to both countries,¹⁴¹ such an agreement is unlikely to be reached considering that the phaseout mechanism of the FPA precludes U.S. negotiators from offering Mexico any long-term access to the U.S. FCZ. Hence the FPA has resulted in withdrawing one of the United States "best bargaining chips" from the negotiating table.¹⁴²

This loss of negotiating power, in addition to the precedent the FPA sets for other countries, acts to impede U.S. access to foreign fisheries. Within two years after passage of the MFCMA,

136. 1980 HOUSE REPORT, *supra* note 11, at 71, n. 1.

137. As . . . developing countries develop coastal fisheries, they trend almost at once into becoming longer and longer range fishermen as well, fishing off the coasts of other countries as a part of their necessary fishery economies just about as naturally and necessarily as the fish migrate for biological necessity. . . .

Chapman, *Fishery Resources in Offshore Waters*, in *THE LAW OF THE SEA* 92-93 (L. Alexander ed. 1977).

138. United States aid to developing states stands at just 0.27 percent of the Gross National Product. This percentage of aid is considered quite low among industrialized states, and a large part of it goes to Israel and Egypt. *The Washington Post*, Oct. 23, 1981, at A20, col. 3.

139. *N.Y. Times*, Dec. 29, 1980, at A1, col. 3.

140. 1980 *Hearings*, *supra* note 13, at 316. "The confusion and dismay it provoked in Japan cannot be described." *Id.* at 310 (statement of Alan Macnow, Tele-Press Associates, Inc.).

141. *N.Y. Times*, *supra* note 139.

142. 1980 *Hearings*, *supra* note 13, at 81 (statement of Thomas Pickering, Dept. of State).

eighty-six other countries followed the lead of the United States and claimed jurisdiction to living resources within 200 miles of their coasts.¹⁴³ If other countries implement phaseout legislation like they implemented 200-mile jurisdictional zones, the U.S. tuna industry will seriously suffer the consequences. The U.S. tuna fleet in 1979 caught \$20.6 million worth of tuna inside the U.S. FCZ, while landing \$134.1 million within the 200-mile zones of other countries.¹⁴⁴ The tuna industry accounts for twenty-one percent of U.S. food finfish earnings, thousands of jobs in the processing sector, and twenty-five percent of the fish consumed in the United States.¹⁴⁵ Thus, the FPA sets a dangerous precedent for other countries to follow, making the phaseout of the U.S. tuna industry from foreign fisheries a woeful possibility.

The harm inflicted upon foreign trade relations by the FPA is likely to prove counterproductive to the goals established for the FPA even if other countries do not resort to phasing out U.S. fishing in their fishery conservation zones. Prior to the introduction of the FPA in the House of Representatives, a joint venture with Japan was in the offing that would supposedly aid the development of U.S. harvesting of underutilized species as well as improve the Japanese market for such U.S.-caught fish.¹⁴⁶ The resentment provoked by the FPA, however, brought an end to these plans.¹⁴⁷

The phaseout mechanism, while designed to allow the U.S. fishing industry to expand into such areas as the harvesting of low-value, underutilized species which are dominated by foreign fleets, actually does nothing to improve the ability of U.S. fishermen to catch the 1.6 million metric tons of low-value fish harvested by foreign vessels in 1979.¹⁴⁸ It also does nothing to improve the U.S. ability to deliver a product that meets the higher

143. 1980 HOUSE REPORT, *supra* note 11, at 71.

144. 1980 *Hearings*, *supra* note 13, at 263 (statement of David G. Burney, U.S. Tuna Foundation).

145. *Id.* at 310.

146. This program included the technical assistance of the Japanese in building a surimi processing plant in Alaska, promulgation of Japanese fish product standards in the U.S., the formation of a market development task force composed of Japanese and American industry leaders, technical assistance to U.S. fish processors and fishermen, a joint venture with Alaskan fishermen, test marketing and U.S. product promotion activities in Japan. *Id.* at 316 (statement of Alan Macnow, Tele-Press Associates, Inc.).

147. *Id.*

148. *Id.* at 314.

quality standards of foreign markets.¹⁴⁹ An analysis by the Institute of Social and Economic Research of the University of Alaska concluded that development of the bottom fish industry in Alaska is likely to take at least ten to fifteen years.¹⁵⁰ Thus, it is doubtful that the FPA will be very effective in expanding the U.S. fishing industry into low-value species harvesting.¹⁵¹

Regardless of the technological capabilities of the U.S. fishing industry, however, an expanded overseas market for U.S.-caught fish is the determinative factor in any formula to promote the U.S. fishing industry.¹⁵² As previously discussed,¹⁵³ the phaseout is inconsistent with linking TALFF allocations to gain foreign market access. Moreover, the diminishing allocations under the phaseout schedule may well spur retribution by foreign markets.¹⁵⁴ The closing off of U.S. fisheries to foreign fleets also encourages the development of substitute fisheries, thereby increasing competition on the world market for fish caught within the U.S. FCZ.¹⁵⁵ Without a market for the anticipated increase in U.S.-caught fish, any increased harvesting capacity of U.S. vessels will prove valueless. Because the FPA fails to make proper overtures to foreign countries in order to effect a lowering of their trade barriers, its objectives appear to be bound for failure.

VI. MARE LIBERUM VIS À VIS MARE CLAUSUM

Why do you deny me water? Its use is free to all. Nature has made neither sun nor air nor waves private property; they are public gifts.¹⁵⁶

Freedom of fishing beyond the limits of the territorial sea has been a high seas freedom ever since the time Hugo Grotius' theory of *mare liberum*¹⁵⁷ first gained ascendancy over John Selden's

149. *Id.*

150. *Id.*

151. *Id.*

152. See *id.* at 264-65 (statement of David G. Burney, U.S. Tuna Foundation).

153. See notes 36-38 *supra* and accompanying text.

154. See 1980 *Hearings*, *supra* note 13, at 309 (statement of Alan Macnow).

155. "We have to look at this as a two-sided venture. In international affairs, the reciprocity very often applies." 1980 *Hearings*, *supra* note 13, at 87 (statement of Thomas Pickering, Dept. of State).

156. Ovid, cited in H. Grotius, *Mare Liberum* (Magoffin trans. 1916), reprinted in H. KNIGHT, *THE LAW OF THE SEA* 2-19 (1980 ed.).

157. "MARE LIBERUM. The sea free. The title of a work written by Grotius against the Portuguese claim to an exclusive trade to the Indies, through the South Atlantic and Indian oceans; showing that the sea was not capable of private dominion. 1 Kent, Comm. 27." BLACK'S LAW DICTIONARY 119 (4th ed. 1951).

theory of *mare clausum*.¹⁵⁸ Grotius and those writers following him adduced two facts as the principal reasons for the freedom the seas: (1) no part of the open sea could be effectively occupied by a navy, and could not therefore be actually controlled by any state, and (2) nature does not give anyone the right to appropriate that which is inexhaustible and may inoffensively be used by everybody.¹⁵⁹ Although both of these factors are now without foundation, Sir Hersch Lauterpacht remarks that "[t]he real reason for the freedom of the open sea is represented in the motive which led to the attack against maritime sovereignty . . .—namely, the freedom of communication, and especially commerce, between the States which are separated by the sea."¹⁶⁰

The modern practice of states exhibits a trend away from the classical *mare liberum*. As the 200-mile FCZ is increasingly accepted as customary international law,¹⁶¹ the United States appears far from being alone in asserting jurisdiction over the high seas.

A phenomenon of our own times is that, after more than three centuries of *mare liberum*, we are now seeing the emergence of a new species of *mare clausum*, not merely through uninhibited national claims as put forward in international arenas like the United Nations Law of the Sea Conferences, but also through concrete state practice as asserted in unilateral state actions trenching upon the classical freedom of the seas and the free availability of its resources to all comers.¹⁶²

In both promulgating the 200-mile FCZ as customary international law¹⁶³ and being the first state to mandatorily phase out all foreign fishing within a conservation zone, the United States appears in the forefront of an international tendency toward a "new" *mare clausum*.

158. "MARE CLAUSUM. The sea closed; that is, not open or free. The title of Selden's great work, intended as an answer to the *Mare Liberum* of Grotius; in which he undertakes to prove the sea to be capable of private dominion. 1 Kent, Comm. 27." BLACK'S LAW DICTIONARY 119 (4th ed. 1951). See A. SWARTZTRAUBER, THE THREE-MILE LIMIT OF TERRITORIAL SEAS 18-22 (1972).

159. L. OPPENHEIM, INTERNATIONAL LAW—A TREATISE 593 (8th ed. H. Lauterpacht 1955).

160. *Id.* at 593-94.

161. See notes 58-66 *supra* and accompanying text.

162. McWhinney, *The Codifying Conference as an Instrument of International Law-Making: From the "Old" Law of the Sea to the "New,"* 3 SYR. J. INT'L L. & COM. 301, 307 (1975).

163. See note 64 *supra*.

VII. CONCLUSION

The American Fisheries Promotion Act of 1980 is unlikely to be successful in promoting the U.S. fishing industry because such promotion is too dependent upon that world market against which it discriminates.¹⁶⁴ While the MFCMA of 1976 recognized that domestic fishermen were to have preference over foreign fishermen in harvesting the optimum yield of a fishery,¹⁶⁵ the FPA makes it possible for foreign fishermen to be phased out completely despite the fact that a surplus of fish exists.¹⁶⁶ Thus, on its face, the FPA is contrary to the Fisheries Convention in failing to serve to secure a supply of food for human consumption.¹⁶⁷ Moreover, the FPA patently subordinates such humanitarian concerns to national economic interests.¹⁶⁸ The United States economic protectionism in fishery resources has received a cold reception abroad and seems unlikely to succeed in opening up foreign markets to U.S. fish produce. Regardless of its immediate effects upon trade and commerce, however, the American Fisheries Promotion Act serves to promulgate a new *mare clausum* in international practice through unilateral action.

Stephen C. Stanley

164. See notes 37-39 *supra* and accompanying text. See also note 155 *supra*.

165. See note 27 *supra* and accompanying text.

166. See notes 28, 36 *supra* and accompanying text.

167. See note 79 *supra* and accompanying text.

168. See notes 119-21 *supra* and accompanying text.